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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE MENDOZA, Defendant and Appellant.	B166146 (Los Angeles County Super. Ct. No. KA058221)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Marc E. Turchin, Supervising Deputy Attorneys General for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and II.

Defendant and appellant Jose Mendoza appeals his conviction for felony child molestation. (Pen. Code,[1] § 647.6, subd. (b).) In the unpublished portion of this opinion, we reject Mendoza's claims that evidence of his prior sexual offenses was improperly admitted in violation of Evidence Code sections 1101 and 352 and that his motion for an acquittal pursuant to section 1118.1 should have been granted on the basis of insufficient evidence that he had an abnormal or unnatural sexual interest in the minor victim because of the victim's age. In the published portion of the opinion, we hold that the requirement of entry into an "inhabited dwelling house," as the term is used in section 647.6, subdivision (b), is met here and that the trial court properly denied Mendoza's acquittal motion because the evidence is sufficient to support his conviction for felony child molestation.

FACTUAL AND PROCEDURAL BACKGROUND

Seventeen-year-old Fernando S. was up past 3:00 a.m. playing computer games in his bedroom when he heard the alarm in his house beeping to indicate an open external door. Fernando investigated the alarm and found a stranger—Mendoza—standing in the house, next to the open front door. Lifting his shirt, Mendoza said he was unarmed and had not stolen anything. Fernando asked what Mendoza wanted; Mendoza asked for directions. Fernando gave him directions and told him to leave.

After Mendoza exited, Fernando closed the front door, locked it, and watched through a window to make sure Mendoza left. Mendoza returned to the door; Fernando opened it and asked what he wanted. Mendoza asked if Fernando wanted "a blow job." Offended and shocked, Fernando declined. Mendoza persisted, asking Fernando if he knew anyone who did. Fernando said no, closed the door, and called the police.

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[1] Unless otherwise indicated, all further references are to the Penal Code.

The police found Mendoza on the street, wearing the clothing Fernando had described. Fernando identified Mendoza in a field show-up.

Mendoza was convicted of felony child molestation (§ 647.6, subd. (b)) and sentenced to five years in prison—four years for the molestation and an additional one-year prior prison term enhancement under section 667.5, subdivision (b). Mendoza appeals.

DISCUSSION

I. Admission of Mendoza's Prior Sex Crimes

Over Mendoza's objection, three prior instances of his exhibitionism and solicitation of sex from male strangers were presented at trial. The first incident, about which Mendoza and a police officer testified, was Mendoza's May 2002 indecent exposure arrest and conviction for riding a bicycle with his buttocks exposed, in a residential area in which children were present; Mendoza had remarked to a man who found the exposure offensive, "Hey, dude. You like butts." The other incidents, to which Mendoza alone testified, were disorderly conduct convictions in 1990 and 1992 in which Mendoza solicited sex from male strangers: in one incident, Mendoza grabbed the penis of an undercover police officer in a public restroom; in the other, Mendoza exposed his penis outside an adult movie theater to an undercover officer he believed to be a potential sexual partner.

Although Mendoza argues that this evidence was inadmissible under Evidence Code section 1101, subdivision (b), Evidence Code section 1108 (section 1108) controls here. Section 1108 provides that "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Mendoza was charged with child molestation, a sexual offense

listed in section 1108. (Evid. Code, § 1108, subd. (d)(1)(A).) One prior offense was a violation of section 314, another enumerated sexual offense; the other two, both disorderly conduct convictions, were sexual offenses because they involved lewd conduct (proscribed by Evidence Code section 314). (Evid. Code, § 1108, subd. (d)(1)(A).) Because Mendoza's priors and the charged offense were sexual offenses under section 1108, the priors were admissible at trial to show Mendoza's possible disposition to commit sex crimes, subject to the constraints of Evidence Code section 352. (Evid. Code, § 1108, subd. (a); see also *People v. Britt* (2002) 104 Cal.App.4th 500, 505 ["By removing the restriction on character evidence in section 1101, section 1108 now 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352"].)

Mendoza argues that the evidence was more prejudicial than probative under Evidence Code section 352. Among the factors to be considered in balancing the probative and prejudicial impact of evidence of other sexual offenses are the nature and remoteness in time of the misconduct, its relevance to the present proceeding, the degree of certainty the defendant committed the conduct, the likelihood of confusing or distracting jurors, the similarity of the charged offense to the prior offenses, the burden on the defendant of defending against the other offenses, the existence of less prejudicial alternatives, and the possibility of excluding inflammatory details of the other offenses. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

The trial court did not abuse its discretion under Evidence Code section 352 by permitting the admission of evidence concerning Mendoza's prior offenses. The probative value of the evidence is clear: Each prior incident involved sexually provocative conduct directed toward male strangers, with an overt solicitation of sexual activity (in the bathroom and adult theater incidents) or an inferable aim of initiating sexual contact (the indecent exposure while cycling). As Mendoza was charged here with soliciting sexual contact with a male stranger—and, when rejected, asking whether

the victim knew anyone who would be interested in the sexual activity he had proposed—these prior offenses were substantively similar and relevant to proving the charged offense.

The incidents were not too remote in time, ranging from only a few months to 12 years prior to the charged offense. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [12 years not too remote]; *People v. Ing* (1967) 65 Cal.2d 603, 612 [offense 15 years earlier was not too remote].) They were not particularly inflammatory in nature, for they were nonviolent and involved adults and undercover officers rather than other minors; and as the jury learned that Mendoza had been arrested for each one, it was unlikely that jurors would have assumed that he had not been punished and thus have attempted to punish him for those offenses in the current proceeding. (See *People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) The evidence, moreover, did not consume excessive amounts of time—for instance, the officer's testimony about one offense covered three pages of the trial transcript. Although the subject of the prior offenses occupied a larger portion of Mendoza's own examination, this does not establish undue consumption of time because Mendoza's quarrels with the prosecutor while testifying contributed significantly to the duration of this questioning. The trial was extremely brief—all the evidence was presented in one day, with argument, instructions, and verdict before the next day's noon recess—and the evidence of prior sexual offenses was sufficiently probative to merit the small investment of time its elicitation required.

Mendoza complains that presenting the past offenses through his testimony resulted in "highly suspect" evidence "without any legitimate substantiation" that "reduced the degree of certainty" that the other offenses were committed and confused, misled, or distracted the jury. Although he attempted to minimize and justify his conduct, Mendoza admitted the essential facts of each incident: grabbing a stranger's penis in a public restroom; having his penis in his hand and proceeding on the belief that the officer outside an adult theater was attempting to pick him up for sex; and having his pants "kind of down" while he rode his bicycle, as well as making the "butts" comment.

We are not persuaded that Mendoza's admissions under oath of the salient features of his prior crimes were "highly suspect," misleading, or insufficient to substantiate his prior offenses.

Based upon the totality of the circumstances, we conclude that the trial court did not abuse its discretion in implicitly determining that the probative value of Mendoza's prior offenses outweighed any potential probative impact, consumption of time, or risk of confusing the jury. Mendoza has not demonstrated that the court's decision to permit the evidence of his prior instances of solicitation and exhibitionism was an "'arbitrary, capricious or patently absurd'" exercise of discretion resulting in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

II. Mendoza's Section 1118.1 Motion: Abnormal Sexual Interest

Mendoza argues that the court should have granted his motion for acquittal because the prosecutor did not present evidence that Mendoza had a sexual interest in Fernando because he was a minor. Contrary to Mendoza's argument, a violation of section 647.6 does not require that the defendant have an abnormal sexual interest in children generally or that the basis for the defendant's interest in or selection of the victim be that he or she is a child—the defendant's motivation must be an abnormal or unnatural sexual interest in the particular victim. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 494; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126; CALJIC No. 10.57.) Accordingly, the fact that the prosecutor did not produce evidence that Mendoza had a sexual interest in children generally or that he targeted Fernando because of his age does not entitle Mendoza to an acquittal.

III. Mendoza's Section 1118.1 Motion: Inhabited Dwelling House

Section 647.6, subdivision (a), sets forth the misdemeanor offense of annoying or molesting a child; subdivision (b) makes the offense a felony when it is committed after the defendant "entered, without consent, an inhabited dwelling house . . . or the inhabited portion of any other building." No California court has defined the term "inhabited dwelling house" in the context of section 647.6, subdivision (b). Mendoza, advocating a narrow reading of the statute, argues that because he withdrew to the house's front porch before propositioning Fernando, he was no longer in an inhabited dwelling house, and the evidence was therefore insufficient to establish a violation of section 647.6, subdivision (b).

Although our state courts have not interpreted the term "inhabited dwelling house" as used in section 647.6, subdivision (b), the phrase is frequently used in California penal statutes that enhance the punishment or increase the severity of criminal offenses when committed in a residential context. (See, e.g., §§ 212.5, 213, 246, 314, 460, 462.) In defining an inhabited dwelling house with reference to those statutes, California courts have consistently interpreted the term broadly and inclusively "to effectuate the legislative purposes underlying the statute, namely, to protect the peaceful occupation of one's residence," and in recognition of the "increased danger and gravity" of residential crimes. (*People v. Cruz* (1996) 13 Cal.4th 764, 775, 776, 779; see also *People v. O'Bryan* (1985) 37 Cal.3d 841, 844-845 ["An entry into an inhabited space is a serious felony because it presents a greater intrusion upon personal privacy, and a greater risk of violent confrontation, than does entry into an uninhabited area"].)

The dwelling house provision was added to section 647.6 (then section 647a) in 1982 by the same enactment that added identical language to California's indecent exposure law, section 314. (Stats. 1982, ch. 1113.) By this amendment, the Legislature treated residential indecent exposure and child molestation more seriously than such acts

occurring in other environments "in recognition of the sanctity of one's residence and the inherent danger presented by residential intruders." (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1768 [discussing legislative intent underlying amendment to section 314].) In light of the Legislature's use of identical language in these penal statutes and the common legislative purpose of the enactments, we conclude that the term "inhabited dwelling house" should be interpreted broadly and inclusively with respect to section 647.6, subdivision (b), as it is in the context of the other statutes. (See *People v. Woods* (1998) 65 Cal.App.4th 345, 347-348 [definition of inhabited dwelling house for purposes of burglary law includes areas not normally considered part of a home's living space]; *People v. Cook* (1982) 135 Cal.App.3d 785 [house's enclosed patio is an inhabited dwelling house for burglary statute]; *People v. Wilson* (1989) 209 Cal.App.3d 451, 453 [hotel lobby is an inhabited dwelling house under robbery statute]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 231-232 [apartment building entryway constitutes inhabited dwelling house for burglary statute]; *In re Christopher J.* (1980) 102 Cal.App.3d 76, 78-79 [in burglary context, partially open carport is an inhabited dwelling house]; see also Use Notes to CALJIC Nos. 10.38 [felony indecent exposure]; 10.57 [child molestation], 14.51 [burglary] [all directing use of CALJIC No. 14.52, defining "inhabited dwelling house" to define the residential component of those crimes].)

The Legislature did not require that the molestation actually occur inside the inhabited dwelling to warrant a section 647.6, subdivision (b) conviction. The statute requires only that the defendant commit the molestation "after having entered, without consent, an inhabited dwelling house" or the inhabited portion of any other building. If the Legislature had meant to require that the offense occur *within* the dwelling in order to qualify as a felony, it easily could have said so. It would be inconsistent with the expansive interpretation of an inhabited dwelling and the Legislature's protective intent to read into the statute a requirement, not included by the lawmakers, that not only must the molestation occur after entry into an inhabited dwelling house without consent but

that it also must take place while the perpetrator and victim both remain within the dwelling in order to constitute a violation of section 647.6, subdivision (b).

Mendoza's crime was no less residential because he propositioned the minor whose house he had entered without consent only after he had stepped out onto the porch. In view of section 647.6's purpose of protecting people in their residences by punishing more severely sexual offenses involving the invasion of a home (see *People v. Rehmeyer*, *supra*, 19 Cal.App.4th at p. 1768), we decline to invent a loophole allowing an individual to escape the increased punishment of subdivision (b) provided that after entering a dwelling without consent, he or she lures the minor outdoors or to a vantage point where the molestation may occur while the perpetrator is outside the four walls of the dwelling, but the child remains inside. Such a rule would contravene the express language of the statute and motivate perpetrators to entice children to leave their dwellings, an outcome hardly consistent with the legislative intent to protect minors in their homes.

This reading of the statute does not permit the unfair bootstrapping of an offense under section 647.6, subdivision (a) to an earlier but wholly unrelated dwelling entry in order to elevate it from a misdemeanor to a felony. As was present here, a clear nexus between the residential entry and the molesting conduct is required. In this case, the residential entry and molestation were closely tied, both temporally and as a single course of conduct. Mendoza's conduct—the unlawful entry into the home of the young boy he had seen before, and his withdrawal and immediate return with a sexual advance at the threshold to the minor he had disturbed within—was sufficient for a reasonable jury to find that he violated section 647.6, subdivision (b). The trial court did not err when it refused to grant Mendoza's section 1118.1 motion on this ground. (*People v. Lines* (1975) 13 Cal.3d 500, 505 [to review denial of a section 1118.1 motion, court examines record for sufficiency of the evidence].)

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.